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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 THOMAS KONTOGIANNIS,
12
13 vs. Petitioner,
14 UNITED STATES OF AMERICA,
15 Respondent.
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CASE NO. 07cr0423-LAB
08cv1373-LAB
12cv2265-LAB

**ORDER DENYING AS TIME-
BARRED PETITION PURSUANT
TO 28 U.S.C. § 2255**

17 On February 23, 2007, Petitioner Thomas Kontogiannis pleaded guilty to one count
18 of violating 18 U.S.C. § 1957. The Court entered judgment on May 19, 2008, sentencing him
19 to 97 months' imprisonment, three years' supervised release, and a fine of \$1,050,000. On
20 July 24, 2008, a petition pursuant to 28 U.S.C. § 2255 was filed on Kontogiannis' behalf.
21 After the Court set a briefing schedule, Kontogiannis filed a motion to withdraw the petition.
22 He represented that, although he had signed a draft of the petition, it was filed by someone
23 else without his authorization. The Court therefore on August 28, 2008 granted him leave
24 to withdraw the petition "without prejudice to refile at a later date, in accordance with
25 applicable rules." (Order of Aug. 28, 2008 (Docket no. 90) at 1:26–2:2. See *also* Motion to
26 Withdraw (Docket no. 89) at 4:10–14 (requesting permission to withdraw the motion "without
27 prejudice to filing such a motion at some later date and in accordance with the applicable
28 rules").)

1 Kontogiannis waited over four years before he filed a new § 2255 petition, bringing
2 the same claims as in his earlier petition while giving a new and conflicting explanation for
3 withdrawing that petition. (Docket no. 98.) Earlier he represented that someone else had filed
4 the petition for him without his permission, and upon discovering this, he sought to have it
5 withdrawn so that he could look it over. He now maintains that he indeed filed the earlier
6 petition, but withdrew it because his attorneys persuaded him to do so for tactical reasons.
7 (*Id.* at 8, 9.)¹ He also represents that “No further motions were filed in this case,” (*id.* at 9),
8 although the docket reflects that a post-trial motion to modify the interest on the fine was
9 filed and adjudicated. The last docket entry before the filing of the current petition was April
10 28, 2009.

11 Had the Court been presented with Kontogiannis’ new explanation instead of the one
12 he gave at the time, it would have denied his request to withdraw his earlier petition and
13 would have required Kontogiannis to either pursue his claims or drop them. But the Court
14 need not determine whether Kontogiannis first or second explanation was false (or whether
15 both were), because it is clear his petition is time-barred. Petitions filed pursuant to § 2255
16 are subject to a one-year statute of limitations running from the latest of four dates.
17 § 2255(f). Here, the time began to run for Kontogiannis on May 19, 2008, when judgment
18 was entered. Furthermore, this petition raises the same claims as the earlier one. (Docket
19 no. 98 at 8 “Petitioner now rehashes the claims raised in his prior petition.”) so he obviously
20 knew and could have raised these same claims four years ago. The one-year limitations
21 period thus expired over three years ago, and relief under § 2255 is unavailable.

22 Kontogiannis repeatedly invokes the phrase “actual innocence,” and if he had any
23 realistic chance at showing he was actually innocent, he might be able to avoid the time bar.
24 A petitioner’s colorable claim of actual innocence permits him to proceed with a petition
25 under 28 U.S.C. § 2241, an “escape hatch” to § 2255’s otherwise applicable time limitations.
26 See *Harrison v Ollison*, 519 F.3d 952, 958–59 (9th Cir. 2008). But the “escape hatch”

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28 ¹ Although the petition’s pages are numbered, the numbering restarts midway through
the petition. For the sake of clarity, the Court will refer to the docketed page numbers which
can be found in the Electronic Case Filing header at the top of the document.

1 provision is only available where a petitioner has not had an “unobstructed procedural shot”
2 at presenting his claim of actual innocence. *Id.* Here, Kontogiannis has had that shot, as
3 illustrated by the fact that he in fact did claim actual innocence in his initial petition, of which
4 he admits the current petition is merely a “rehash.”

5 Kontogiannis also cites the Court’s order of August 28, 2008, as if it extended the
6 limitations period. (See Docket no. 98 at 2 (“Court granted motion to withdraw Section 2255
7 without prejudice to refiling. The petitioner now refiles.”)) It did not. The Court’s order did not
8 purport to extend, toll, or suspend the running of the limitations period in § 2255(f); rather,
9 it specified that he could refile “in accordance with applicable rules.” In other words, because
10 the initial petition was dismissed without prejudice, if Kontogiannis filed another § 2255
11 petition, it would not be considered a “second or successive” petition. See *Green v. White*, 223
12 F.3d 1001, 1002 n.1 (9th Cir. 2000) (explaining that, if initial petition is adjudicated on the
13 merits or dismissed with prejudice, later petition will generally be considered “second or
14 successive”). But if Kontogiannis wanted to file another petition, he still had to comply with
15 applicable rules. Those “applicable rules” include the one-year limitations period.

16 Other than the arguments discussed, Kontogiannis makes no effort to show why the
17 limitations period should be tolled or extended in any way.

18 Finally, although not necessary to the Court’s decision, it is apparent Kontogiannis’
19 “actual innocence” claim is frivolous. He essentially argues that he would have been
20 acquitted at trial because the amount of money fraudulently transferred was \$525,000,
21 instead of over \$1 million which (he claims) was alleged in the information.² (See Docket no.
22 98 at 10–11.) In fact, the information merely alleges that the amount was “greater than
23 \$10,000.” See also 18 U.S.C. § 1957(a) (specifying that the value be “greater than
24 \$10,000”). Rather than the pleading allegations in the complaint, what Kontogiannis is
25 actually referring to are Guideline provisions that he stipulated to in his plea agreement.
26 These have no bearing on whether he was guilty of the offense, but relate only to what the

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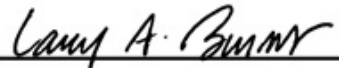
28 ² Kontogiannis waived indictment.

1 proper sentence was. Based on his own admission, he was guilty, and there is no foundation
2 for any "actual innocence" argument.

3 The petition is **DENIED** and a certificate of appealability is also **DENIED**.
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5 **IT IS SO ORDERED.**

6 DATED: September 18, 2012

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8 **HONORABLE LARRY ALAN BURNS**
9 United States District Judge
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